BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of	)	
1998 Biennial Regulatory Review --	)	
Review of the Commission's Broadcast Ownership	)	MM Docket No 98-35
Rules and Other Rules Adopted Pursuant to Section	)	
202 of the Telecommunications Act of 1996	)	

COMMENTS OF TIME WARNER CABLE

July 21, 1998

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SUMMARY

Time Warner Cable submits that the statutory text and legislative history to the 1996 Telecommunications Act, elementary constitutional analysis, and the dramatic competitive, technological and regulatory changes since the ban's enactment overwhelmingly illustrate that the Commission should repeal the ban on cross-ownership of co-located cable systems and broadcast television stations.

In enacting Section 202(h) to the 1996 Act, directing the Commission to review its broadcast ownership rules biennially to determine whether any were still in the public interest, Congress intended to place a heavy burden on the Commission to justify, based on empirical findings, any broadcast ownership rules it seeks to retain. Unlike in 1970, when the Commission summarily instituted the ban with barely any explanation and based on no empirical findings that co-owned, co-located television stations and cable systems posed some harm, the Commission must now articulate a cogent public interest rationale, based on substantive evidence, in order to justify the ban's validity to comply with the statute and legislative history of Section 202(h).

Its statutory mandate aside, the Commission must also show that the cable/television station cross-ownership ban meets at least intermediate constitutional scrutiny. Under Turner Broadcasting I and other cases recognizing the First Amendment rights of cable operators, the Commission must "demonstrate that the harms" the ban purportedly addresses "are real, not merely conjectural" and that the ban "will in fact alleviate these harms in a direct and material way." In other words, the Commission must illustrate the problems with its governmental interests of diversity and competition posed by co-owned, co-located television stations and

cable systems and how the ban cures those harms in such a direct way so as to comport with the First Amendment's narrow tailoring requirements.

The Commission has never identified any compelling or important problems relating to diversity or competition which the cable/television station cross-ownership ban is designed to cure. But even if those interests could satisfy the First Amendment tests, the dramatic competitive, technological and regulatory changes since the ban's enactment in 1970 more than adequately address any concerns about the impact on diversity and competition of co-owned, co-located television stations and cable systems. Retaining the ban, even as these changes have ensured thriving competition among MVPDs, unnecessarily deprives the viewing public of the economies of scale and other benefits of cable system/television station cross-ownership.

Taken individually, these three components of the analysis of the cable/television station cross-ownership ban -- the Commission's burden under Section 202(h), its burden to show that the harms are at least an important governmental interest and how the ban counters those harms under the First Amendment, and the wholesale changes in the competitive dynamics of video delivery services -- each are sufficient for the Commission to repeal the ban. Taken together, they leave the ban's repeal as the only logical outcome to this proceeding.

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits its comments in response to the Commission's Notice of Inquiry on the Biennial Review of its broadcast ownership rules.[1] Specifically, Time Warner urges the Commission to repeal the ban on cross-ownership of co-located cable systems and broadcast television stations.[2] The Commission instituted the cable/broadcast cross-ownership ban in 1970,[3] and Congress codified the ban in the 1984

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[1]In the Matter of 1998 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Inquiry, MM Docket No. 98-35 (rel. March 13, 1998) ("Notice").

[2]The Commission's rules bar an entity from holding an attributable interest in both a cable system and a television station whose Grade B contour overlaps such system (referred to hereafter as "co-located"). 47 C.F.R. § 76.501(a).

[3]Amendment of Part 74, Subpart K, of the Commission's Rules And Regulations Relative to Community Antenna Television Systems; And Inquiry Into The Development Of

Cable Communications Policy Act.[4] Congress subsequently repealed the statutory restriction in the 1996 Telecommunications Act[5] but left Section 76.501(a) of the Commission's rules in place, pending the Commission's biennial review of all of the broadcast ownership rules as directed by Section 202(h) of the 1996 Act.

I. SECTION 202(h) MANDATES A *DE NOVO* REVIEW OF THE CABLE/TELEVISION STATION CROSS-OWNERSHIP BAN

Before examining the constitutional questions posed by the cable/television station cross-ownership ban, Time Warner wishes to emphasize the burden that the Commission must meet pursuant to Section 202(h) of the 1996 Act in order to retain the ban. The Commission faces not one, but two, statutory directives to examine all of its broadcast ownership rules, including the cable/television station cross-ownership ban. In addition to the general requirement in Section 11 of the 1996 Act that the Commission discard unnecessary regulations,[6] Section 202(h) expressly requires the Commission to engage in a *de novo* review of all of its broadcast ownership rules and affirmatively find, based on empirical evidence, that

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Communications Technology And Services To Formulate Regulatory Policy And Rulemaking And/Or Legislative Proposals, 23 FCC 2d 816 (1970) ("1970 Cable Order").

[4]Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[5]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[6]Section 11 obligates the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161 (1996).

those retained serve the public interest.[7] Specifically, Section 202(h) directs the Commission to "review its rules adopted pursuant to this section ... and ... determine whether *any* of such rules are necessary in the public interest as the result of competition."[8]

By including a separate provision compelling the Commission to review its broadcast ownership rules, Congress clearly intended to place the burden of proof squarely on the FCC to articulate a cogent public interest rationale for retention of any of the broadcast ownership rules. Indeed, given Section 11's broad mandate that the Commission review all of its regulations, Section 202(h)'s presence in the 1996 Act demonstrates Congress' intent that the Commission meet a higher level of proof in the broadcast ownership context. If not to place the onus on the FCC to justify each of its broadcast ownership rules, Section 202(h) would be superfluous.

Legislative history confirms this conclusion. The Conference Report to the 1996 Act explains that "based on its *findings* in [the biennial review of broadcast ownership rules], the Commission is directed to repeal or modify any regulation it determines is no longer in the public interest."[9] The legislative history also makes clear that Congress envisioned a paring down or outright elimination of the broadcast ownership rules through the biennial review process; earlier drafts of the legislation simply eliminated many of the ownership restrictions,

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[7]Section 202(h) to the 1996 Act.

[8]Id. (emphasis added).

[9]H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 163-164 (1996) (emphasis added).

but as a compromise, legislators agreed on a biennial review.[10] Combined with the statutory repeal of the cable/television station cross-ownership ban,[11] this testimony indicates a presumption against the ban's validity that can be overcome only by specific, empirical findings by the FCC showing a nexus between the cable/television station cross-ownership ban and any public interest goals the Commission believes would be served through retention of such rules.

The Commission's statutorily-imposed burden to justify its ownership rules contrasts sharply with the grounds on which it based these rules in 1970. The Order instituting the ban contains scant explanation of any empirical evidence that influenced the Commission's decision to bar co-ownership of co-located cable systems and television stations.[12] Indeed, shortly before imposing the cable/television station cross-ownership ban, the Commission issued an Order on a variety of broadcast ownership issues in which it apparently deemed self-evident the proposition that it need not find specific evidence of improper conduct in the broadcast ownership arena before restricting broadcast ownership because the harm from multiple ownership was perceived as too intangible.[13] Similarly, in its first review of the

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[10] S. Rep. No. 23, 104th Cong., 1st Sess. 69 (1995).

[11] Section 202(i) to the 1996 Act.

[12] See 1970 Cable Order. This cursory analysis and lack of justification is found generally in the Commission's broadcast ownership rules. See 1970 Broadcast Order.

[13] In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 FCC 2d 306 (1970) ("1970 Broadcast Order") at para. 20 ("The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and

cable/television cross-ownership ban in 1973, the Commission apparently felt no need to provide empirical support for retaining the ban, summarily hypothesizing and justifying its actions based on the unsupported premise that "actions taken by cable system operators ... can affect the audience and earnings of co-located television stations."[14] Instead, in striking contrast to its current mandate under Section 202(h) that it justify its ownership rules, the Commission demanded in 1973 that *opponents* of the rule show that "cable's growth would be significantly retarded by the unavailability, under our rules, of financial investment by co-located [broadcast television] stations."[15]

Section 202(h) clearly prohibits such conclusory and vague reasoning today. In contrast to the essentially intuitive rationale in the 1970 and 1973 Commission pronouncements on cable/television station cross-ownership, the Commission now must offer specific substantive evidence proving the efficacy of each broadcast ownership rule it wishes to retain. The FCC indeed faces a formidable challenge under the statute if it seeks to argue for the ban's continued validity. This burden is made all the more difficult by the Commission's specific determination in 1992 that the cable/television cross-ownership ban is no longer valid

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that remedial action need not await the feared result.")

[14] Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 39 FCC 2d 377, 392 (1973).

[15] Id.

and therefore should be repealed.[16] Thus, under Section 202(h), if the Commission is unable to develop a new rationale, supported by empirical evidence, it has no choice but to eliminate the rule.

II. THE CABLE/TELEVISION STATION CROSS-OWNERSHIP BAN VIOLATES THE FIRST AMENDMENT UNDER EITHER STRICT OR INTERMEDIATE SCRUTINY

Stated succinctly, the cable/television station cross-ownership ban is an attempt to restrict a speaker's ability to disseminate video speech through multiple outlets. Thus, although it has eluded judicial analysis of its constitutionality since 1970,[17] the ban surely is unconstitutional under either of two possible tests: strict or intermediate scrutiny. Under strict scrutiny, the government must prove that the ban advances a compelling government interest through means that are no greater than necessary to achieve the governmental goals.[18] The

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[16] In the Matter of Amendment of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156, para. 17 (1992) ("Network/Cable Cross-Ownership Order") ("[W]e believe that the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing changes in the video marketplace.")

[17] Although not directly challenged, the validity of the ban was addressed in Iacopi v. FCC, 451 F.2d. 1142 (1971), where the court seemed to assume the constitutionality of the rules based on an analogy to the telephone/cable cross-ownership ban upheld in General Telephone Company of the Southwest v. U.S., 449 F.2d 846 (5th Cir. 1971). 451 F.2d at 1147. As noted infra, the Iacopi court's analysis rested on a slender reed indeed -- the telco/cable cross-ownership ban has subsequently been found unconstitutional by numerous federal courts.

[18] Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

Commission would have the substantial burden to show the harm the ban purportedly prevents and how it prevents this harm in such a way as to comply with the nearly precise fit demanded by strict scrutiny. If the cable/television station ban is to be judged under intermediate scrutiny, the government must show that the restriction on speech furthers an important or substantial governmental interest and is narrowly tailored to the furtherance of that interest.[19]

As it must to comport with a restriction on cable operators' speech rights under established First Amendment jurisprudence, the Commission has never identified the harm to its viewpoint diversity and competition interests posed by co-owned, co-located cable systems and television stations or how the ban addresses such harm. In fact, the Commission affirmatively found in 1992 that the cable/television cross-ownership ban no longer serves even a "valid" governmental interest,[20] let alone a compelling or important one. Even were the Commission to reverse itself and try to show that the continuation of the restriction would serve to remedy some important or compelling problem, the sweeping cable/television cross-ownership ban obviously fails to meet the narrow tailoring requirements of either the strict or intermediate scrutiny tests.

A. Cable Operators' Status As First Amendment Speakers Has Been Firmly Established.

The historical lack of a comprehensive test to the ban's constitutionality largely can be attributed to erroneous historical legal conceptions of the constitutional status of cable

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[19]U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

[20]Network/Cable Cross-Ownership Order at para 17.

operators. In 1970, when the Commission first adopted the ban, the nascent cable industry was not generally recognized as a First Amendment speaker from a legal perspective. Rather, cable operators were thought to resemble common carriers because they largely performed the essentially passive function of simply retransmitting any available local broadcast signals. During such early stages of development, few cable systems engaged in significant editorial functions such as the creation of programming or the selection and packaging of multiple program options.

Today, the Supreme Court has made it clear, in no uncertain terms, that cable operators are First Amendment speakers vested with an editorial discretion over the selection, arrangement, marketing and distribution of programming on their systems.[21] As a result, courts now afford cable operators the full complement of available constitutional safeguards.

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[21]Turner Broadcasting v. FCC, 512 U.S. 622, 636 (1994) ("Turner I") ("There can be no disagreement ... cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986) (a cable operator "communicate[s] messages" through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire."); FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) ("cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include."); Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("Cable television ... is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'"); Daniels Cablevision v. U.S., 835 F.Supp. 1, 10 (D.D.C. 1993), aff'd in part Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) ("Any governmentally ordained quota on the number of subscribers a cable operator may reach leaves the operator with absolutely no intra-medium means of speaking to the remainder of its potential audience. The First Amendment protects the right of every citizen to reach the minds of any willing listeners and, thus, the speaker's opportunity to win their attention.")

As the Court explained in Turner Broadcasting v. FCC:

> When the government defends a regulation on speech as a means to redress past harms, or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured' .... The government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[22]

This clear directive from the Court illuminates the formidable task faced by the FCC in the event it seeks to defend the cable/television station cross-ownership ban from constitutional attack. The Commission, as the governmental proponent of a restriction on the speech of an established First Amendment speaker, bears the responsibility for demonstrating the perceived harms the speech restriction is intended to address and establishing how the restriction will alleviate these concerns in a specific and concrete manner.

B. The Commission Has Identified No Compelling Or Important Problems In The Areas of Diversity Or Competition Which Might Be Cured Through Retention Of The Ban.

The Commission has remained consistent in identifying the promotion of diversity and competition as the two overriding goals underlying its broadcast ownership rules.[23] However, the Commission has been equally consistent in failing to identify any important, let

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[22]Turner I, 512 U.S. at 664 (1994).

[23]Notice at para. 4; 1970 Cable Order at para 12. Time Warner notes that the plain statutory language of Section 202(h) does not include diversity in its directive to the Commission to "determine whether any of [the broadcast ownership] rules are necessary in the public interest *as the result of competition*." Section 202(h) to the 1996 Act (emphasis added). There is no indication that Congress intended that diversity factor into the FCC's determination under Section 202(h).

alone compelling, problems relating to diversity or competition which it believes require redress through retention of the cable/television cross-ownership ban.

i. Diversity

Viewpoint diversity, defined in the Notice as a multiplicity of viewpoints available through and among various media,[24] seems to have been a major impetus behind the Commission's adoption of a variety of restrictions on broadcast ownership in 1970.[25] Of course, such a conclusion is pure conjecture because the Commission's Order banning co-located cable/television station cross-ownership provides little, if any, justification for the ban.[26] The Commission has never specified, in 1970 or since, the lack of diversity that supposedly is threatened by the co-ownership of co-located cable and broadcast stations and how the ban advances that diversity.

Given the paucity of analysis of the harm to diversity supposedly presented by co-owned, co-located cable systems and television stations, the constitutional analysis of the Commission's diversity interest is fairly straightforward. The Commission has made no showing that the existing level of diversity among media, entertainment and information

[24]Notice at para. 6.

[25]1970 Broadcast Order at para. 16 ("Our Constitution rests upon the ground that 'the ultimate good desired is better reached by free trade in ideas ...'"), citing Justice Holmes dissenting in Abrams v. U.S., 250 U.S. 616, 630. See also id. at n.5 ("...right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."), citing U.S. v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), aff'd 326 U.S. 1 (1945).

[26]The 1970 Cable Order contains remarkably little explanation for the ban. Time Warner reiterates that Section 202(h) forbids such conclusory reasoning. See Turner I, supra.

outlets somehow constitutes either a compelling or important governmental problem or that retention of the ban is somehow necessary to rectify any such problem. Indeed, the Commission's most recent pronouncement regarding the cable/television station ban called for the ban's elimination. Similarly, no attempt has been made to illustrate that the ban is narrowly tailored to achieve this diversity, even were it somehow justified as compelling or important. Almost by definition, the sweeping scope of the ban precludes a finding that it is narrowly tailored to achieve diversity.

ii. Competition

Competition represents the other guiding principle behind the Commission's public interest standard, generally, and the broadcast ownership rules, in particular.[27] While promotion of competition undeniably remains as a fundamental goal of the Commission's regulatory policy,[28] the Commission has never explained the threat to competition posed by co-located television stations and cable systems, nor justified how the cable/television station cross-ownership ban promotes competition in a manner that would even approach consonance with First Amendment standards. The Commission seemed to rely on an aversion to concentration as a self-evident rationale for opposing cross-ownership of co-located television

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[27]Notice at para. 4.

[28]Again, Time Warner's recognition of the Commission's policy goals should not be viewed as an acknowledgment of any statutory authority for such FCC involvement. Indeed, Time Warner continues to believe that any appropriate governmental role in oversight of competition is fully accomplished through other federal agencies.

stations and cable systems when it promulgated the rule in 1970.[29] Rather than fully explain the harm, the Commission simply pointed out statistics showing a trend toward concentration as its justification.

That "analysis," such as it is, simply does not pass constitutional muster under either strict or intermediate scrutiny, let alone the arduous burden the Commission must bear under Section 202(h). There is no evidence that a co-owned cable/television station combination would lead to competitive abuses and the Commission has offered none. There is also no evidence that the imposition of the cable/television station cross-ownership ban in any way has produced competitive benefits. To the contrary, the economies of scale offered by jointly-owned cable systems and television stations would produce significant efficiencies not available under the current ban.

The Commission's essentially intuitive aversion in 1970 to "centralization of control over the media of mass communications, like monopolization of economic power, as *per se* undesirable"[30] mirrored the then-dominant approach to the antitrust laws, which likewise exhibited a mistrust of concentration.[31] However, within the past twenty-five years, as the

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[29] 1970 Cable Order at para. 11 ("If these figures reflect a trend toward domination of the cable industry by an already overly-concentrated broadcast industry, the Commission has an obligation ... to take appropriate action.")

[30] 1970 Broadcast Order at para. 17.

[31] See, e.g., Northern Pacific R. Co. v. U.S., 356 U.S. 1 (1958) (preferential routing clauses forcing lessors of railroad's land to ship via railroad if rates comparable to other competitors were *per se* illegal); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (maximum resale price fixing *per se* illegal); U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (vertical nonprice restrictions *per se* illegal); Albrecht v. Herald

pro-competitive benefits of business practices and mergers previously rejected out of hand became apparent, this rigid *per se* categorization gave way to a more thorough rule of reason analysis that now emphasizes the effects on consumers of the practice in question.[32] In the same manner, the instinctive and undocumented opposition to media concentration reflected in the Commission's cable/television station cross-ownership restriction should accede to an evaluation that recognizes the economies of scale and other pro-competitive benefits inherent in such combinations.

C. The Dramatic Competitive, Technological And Regulatory Changes That Have Occurred Since 1970 More Than Adequately Serve the Commission's Diversity And Competition Goals.

As demonstrated above, the Commission has failed to even "posit the existence of the disease to be cured" by maintaining the cable/television station cross-ownership ban, let alone satisfy its burden of demonstrating that the harms are real, not merely conjectural, and that retaining the regulation will in fact alleviate these harms in a direct and material way.[33] To the extent that the Commission attempts to fall back to the historical goals of diversity and competition relied upon in 1970 when the ban was adopted, the profound competitive,

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Co., 390 U.S. 145 (1968) (vertical maximum price fixing *per se* illegal).

[32]See, e.g.,Monsanto Co. v. Spray Rite Service Corp., 465 U.S. 752 (1984) (courts should not permit fact finders to infer conspiracies when such inferences are implausible because such inferences often deter pro-competitive conduct); Continental TV Inc. v. GTE Sylvania, 433 U.S. 36 (1977) (vertical nonprice restrictions to be judged under rule of reason (overruling Schwinn)); State Oil v. Kahn, 118 S.Ct. 275, 1997 U.S. LEXIS 6705 (1997) (vertical maximum price fixing to be evaluated under rule of reason (overruling Albrecht)).

[33]Turner I, 512 U.S. at 664.

technological and regulatory developments since the Commission implemented the cable/television station cross-ownership ban demonstrate that the hypothetical harms of 1970 have failed to materialize and that unfettered competition is far more effective in advancing these policies than regulatory intervention. Insofar as the statute confers on the FCC authority to engage in an inquiry into diversity, a thriving video marketplace ensures a diversity of voices and ease of entry for new speakers. Technological advancements have provided a dizzying array of outlets for speakers seeking access to consumers. Existing regulatory safeguards fully address any risks associated with co-ownership of co-located cable systems and broadcast stations. Allowing commercially beneficial partnerships between co-located cable systems and broadcast stations to form by repealing the cross-ownership ban best serves the Commission's public interest mandate.

Today, along with almost every other aspect of communications technology, that which looked certain with respect to cable operators and television stations in 1970 now seems so antiquated as to be merely of historical interest. The currently available outlets for speech via video dwarf those existent in 1970. Even confining the analysis strictly to broadcasting, the number of broadcast outlets in 1998 far surpass those available in 1970.[34] It is now nearly universally recognized that the technological changes since 1970, including digital compression and the opening of previously unused amounts of spectrum, have created virtually an infinite

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[34]In 1997, there were 1,141 commercial television stations. Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996, 9 CR 412, para. 285 (1997). In 1970, there were only 690 commercial television stations. Amendment of 47 C.F.R. 73.658(j)(1)(i) and (ii), The Syndication and Financial Interest Rules, 94 FCC 2d 1019, para. 108 (1983).

amount of physical capacity to transmit video signals.[35] What was apparent to the Commission as early as 1985 in its report on the Fairness Doctrine[36] today is undeniable. Media ownership restrictions, even those involving television stations, can no longer be justified on the basis of spectrum scarcity.

In addition, new multichannel distribution technologies such as DBS, MMDS, OVS and LMDS, and entirely new media such as the Internet, offer a plethora of available information sources unimaginable to the Commission that promulgated the rule in 1970. For instance, five different DBS providers have a combined subscriber base second only to that of traditional cable systems and subscription to DBS continues to expand exponentially.[37] Taken as a whole, these

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[35]See, e.g., T. Hazlett, Physical Scarcity, Rent Seeking and the First Amendment, 97 Colum. L.Rev. 905, 911 (May 1997) ("Any once-critical scarcity problem appears to have been surmounted."); Stern *et al.* The New Video Marketplace and the Search for a Coherent Regulatory Philosophy, 32 Cath.U. L.Rev. 529, 565-66 (Spring 1983) ("Multiplexing, compression and subcarrier operations are means of providing more than one service over the same spectrum allocation. As a result of such developments, the scarcity rationale might no longer be applicable to the emerging media environment."); J. Gregory Sidak, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS: FREE SPEECH at 303-304 (AEI 1997) ("On engineering grounds, the spectrum scarcity premise ... is untenable."); Lillian R. BeVier, Campaign Finance Proposals: A First Amendment Analysis, CATO Policy Analysis No. 282 at pp. 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler and Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L.Rev. 207, 221-26 (1982).

[36]Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 143 (1985) at paras. 1179 et seq.

[37]Id. at paras. 54-55. DBS now has 7.8 million subscribers. Monica Hogan, DBS Sales Heat Up in June, Multichannel News, July 20, 1998 at 3.

outlets provide a panoply of video[38] options for speakers to reach the American public. Indeed, the Commission recognized the impact of the profound changes in the delivery of video services on the rationale for the cable/television station cross-ownership ban when it urged Congress to repeal the ban in 1992.[39]

In addition to the growth in outlets and the creation of new media, specific technological and legal developments within the cable industry have had a profound effect in increasing viewpoint diversity and addressing any remaining concerns over co-located cable and broadcast television stations. Cable channel capacity has exploded compared to its limited extent in 1970; in the coming years, digital compression advances promise to offer more -- and significantly more -- options for cable viewers. Second, less sweeping regulatory safeguards, such as the must-carry,[40] leased access[41] and program carriage[42] rules, as well as cable operators' PEG obligations,[43] provide opportunities for diverse speakers over cable. The very premise that a

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[38]By citing examples of new video distribution technologies, Time Warner does not concede that an analysis of the growth of media competition could appropriately focus exclusively on video distribution. The growth of other media, such as the Internet, radio stations, print publications, video cassettes and video discs, are all to be considered when assessing the impact of co-located cable/television station cross-ownership.

[39]Network/Cable Cross-Ownership Order at para. 17 (1992) ("[W]e believe that the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing changes in the video marketplace.")

[40]Id. § 534.

[41]Id. § 532(c).

[42]Id. § 536(a).

[43]Id. § 531.

co-owned, co-located cable and broadcast station could monopolize public debate in today's highly diversified media world is untenable. But even assuming arguendo that premise's possibility, the Commission's must carry rules and other regulatory safeguards fully address the traditional concerns underlying the ban.

Were the Commission to conclude that these enormous technological and legal changes, unimaginable in 1970, inadequately provided for a robust exchange of diverse viewpoints, the FCC still faces the unenviable challenge of proving a sufficient nexus between separate ownership of co-located cable systems and television stations and a corresponding increase in viewpoint diversity. That nexus must satisfy both Section 202(h)'s stiff evidentiary burden and meet at least intermediate scrutiny's important interest and narrow tailoring requirements. In other words, proponents of retaining the cable/television station cross-ownership ban must illustrate how the restriction on speech advances the goal of viewpoint diversity. For example, if the Commission were to posit that ownership diversity inevitably leads to diversity of programming, it must produce empirical data to support that proposition.

In any event, marketplace competition rather than structural regulation provides the better method for increasing viewpoint diversity. Indeed, the Commission has already signaled the appropriateness of this approach in the broadcast arena by refusing to consider format changes in the licensing process for radio stations. The Commission's conclusion that competitive forces, which are by definition responsive to changing public preferences, were the best tools to advance diversity of radio formats[44] should apply equally to its evaluation of diversity in the television broadcasting context. The Supreme Court expressed its approval for this de-regulatory posture in FCC v. WNCN Listeners Guild,[45] in which the Court refused a petition by listeners to review the FCC's policy statement on the examination of programming formats in radio licensing proceedings. Allowing the free marketplace to function is the best guarantee for a robust exchange of diverse viewpoints.

Similarly, with respect to the Commission's competition goal, the competitive landscape, technology and regulations existent in 1998 present a very different picture to the Commission as it weighs the utility of maintaining a cross-ownership ban instituted almost thirty years earlier. The growth in broadcast stations has diffused the power of the broadcasting medium. Cable has emerged as a highly successful video distribution mechanism, but it faces aggressive and increasing competition from other technologies, including DBS and MMDS. The must-carry requirement has removed any possibility that a cable system could favor one broadcaster to the detriment of others in the same area. The Commission's regulations have facilitated entry into video services distribution in ways unimaginable to the 1970 Commission, such as the effort to allow telephone companies to develop Open Video Systems. In short, it makes no more sense to apply a regulatory tool designed for the world in 1970 onto the 1998 marketplace than it does to send astronauts to

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[44]Development of Policy Re: Changes In The Entertainment Formats of Radio Stations, 60 FCC 2d 858, 863 (1976).

[45]450 U.S. 582 (1981).

the moon in the original shuttle employed in 1969. However, if the Commission thinks the regulatory tool still applies, it must present empirical evidence of specific ways in which such combinations harm the public interest and show how any reimposed rule is narrowly tailored to address those harms.

D. Judicial Precedent Relating To Cross-Media Restrictions Demonstrates That The Cable/Television Station Ban Is Unconstitutional.

Ample precedent interpreting the constitutionality of cross-media restrictions confirms that the cable/television station cross-ownership ban is unconstitutional. Even one of the Supreme Court's leading cases *upholding* a governmental restriction on media ownership, FCC v. National Citizens Committee for Broadcasting,[46] in fact supports repeal of the ban because of its substantial deference to the Commission's predictive judgment, which is clearly not contemplated by either the language of Section 202(h) nor as a restriction on an established First Amendment speaker.

In affirming the Commission's ban on newspaper/broadcast cross-ownership,[47] the NCCB Court determined that although no demonstrable nexus between the ban and any increase in viewpoint diversity existed, the FCC acted rationally because diversity was an "elusive concept" not easily measured, therefore allowing the Commission wide latitude to rely on its own expertise in making predictive judgments.[48] Unlike with respect to the newspaper/broadcast

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[46]436 U.S. 775 (1978).

[47]47 C.F.R. § 73.3555(d).

[48]436 U.S. at 796-7.

rule at issue in NCCB, the Commission clearly bears the evidentiary burden under Section 202(h) to defend the cable/television station ban in the instant proceeding. Indeed, to the extent that NCCB seems to suggest that the Commission can establish media ownership restrictions based on unsupported "predictive judgments," that approach has been squarely repudiated by the Court in the more recent Turner I case.[49] The legal and factual baseline assumptions against which the Commission must assess the cable/television station cross-ownership ban make NCCB an ally, not a foe, of the ban's opponents.

Other cross-ownership cases confirm that a ban on media cross-ownership is at least subject to intermediate scrutiny and will be found unconstitutional on First Amendment grounds where competitive conditions or less restrictive regulatory safeguards fully address any anti-competitive concerns. For example, in a series of decisions prior to the 1996 Act, several federal courts struck down Section 533(b) of the 1984 Cable Act, which prohibited local exchange carriers (LECs) from owning cable systems in regions where they offered telephone service.[50] Though the courts' interpretations differed slightly, the general legal analyses fit a clear pattern. Evaluating the restriction under intermediate scrutiny, courts had no trouble in concluding, based on the Commission's own recommendation,[51] that the governmental interest underlying the telco/cable ban did not qualify as substantial and that the ban failed the standard's narrow

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[49]Turner I, 512 U.S. at 664. See also Tribune Company v. FCC, Docket Nos. 97-1228-11229, (D.C. Cir. January 16, 1998) (remarking that the Court upheld the Commission's judgment in NCCB by relying on the Commission's predictive judgment.)

[50]47 U.S.C. § 533(b) (1984).

[51]Video Dialtone Order, 7 FCC Rcd 5781, 5847-50 (1992).

tailoring requirement.[52] These courts also generally demanded that the government demonstrate the harm the constraint on cross-ownership was designed to avoid and how the restriction on speech would do so.[53]

The posture of the cable/television station cross-ownership restriction bears a remarkable resemblance to the determination of the telco/cable ban's unconstitutionality. As with telco/cable cross-ownership, the Commission has also recognized that the cable/television station ban is no longer necessary in light of changing competitive dynamics.[54] In addition, the cable/television station ban is a blunt instrument that prohibits cable operators from reaching an entire audience, and accordingly would not survive a narrow tailoring analysis. The Commission should repeal the cable/television station ban simply to bring its rules in line with established precedent.

The telco/cable cross-ownership cases are also noteworthy for their evaluations of the First Amendment's narrow tailoring requirement. When the telco/cross-ownership restriction was first enacted in 1970, the FCC was principally concerned that, due to their control over

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[52]See, e.g., Southern New England Telephone Company v. FCC, 886 F.Supp. 211 (D.Conn. 1995); C&P Telephone Co. v. U.S., 42 F.3d 181, 201 (4th Cir. 1994); Ameritech v. U.S., 867 F.Supp. 721, 736 (N.D.Ill. 1994); U.S. West v. U.S., 855 F.Supp. 1184, 1192-93 (W.D.Wash. 1994); BellSouth Corp. v. U.S., 868 F.Supp. 1335, 1341-42 (N.D.Ala. 1994).

[53]See, e.g., BellSouth Corp. v. U.S. 868 F.Supp. 1335, 1341 (N.D.Ala. 1994) ("When the government defends regulation on speech to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," citing Turner I).

[54]Network/Cable Cross-Ownership Order at para. 17.